

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

JEFFREY FAYCURRY, et al,

Plaintiffs,

v

RICHARD LaLONDE, et al,

Defendants.

Case No. 2014-139417-CZ

Hon. Wendy Potts

Consolidated with 2014-139488-CK

OPINION AND ORDER RE: DEFENDANTS RICHARD LALONDE AND LALONDE
PROPERTIES, LLC'S MOTION FOR SUMMARY DISPOSITION

At a session of Court
Held in Pontiac, Michigan

On

FEB 13 2015

This dispute arises from Plaintiffs Jeffrey Faycurry and Jeffrey Faycurry, DDS, PLC's lease of office space in Auburn Hills from Defendant LaLonde Properties, LLC. Plaintiffs claim that they began leasing the property in November 1994 and did not have any difficulties until after LaLonde Properties purchased the building in January 2007. Defendants claim that Plaintiffs were in arrears on rent and CAM payments when LaLonde Properties acquired the building and have been repeatedly behind in payments since then. Plaintiffs claim that LaLonde Properties failed to maintain the premises, which forced Plaintiffs to look for new leased space.

Sometime in 2013, Plaintiffs began looking for that new office space and purchased new equipment for it in February 2014, which was apparently installed at the new location in March 2014. In late February 2014, Plaintiffs hired dental equipment supplier Henry Schein to disassemble dental equipment installed in LaLonde's building so that a moving company could

move it to Plaintiffs' new location on March 9, 2014. Plaintiffs claim that the equipment was undamaged and in working order when they were preparing for the move on Friday, March 7. However, when Plaintiffs' employees returned on Monday, March 9, the office door locks were changed and they could not access the premises. Dr. Faycurry claims he went to the offices that day where he met Defendant Richard LaLonde, one of the owners of LaLonde Properties. Faycurry claims that LaLonde punched and choked him in front of Faycurry's 12 year-old son. Although LaLonde admits that the two had a physical altercation, he denied punching or choking him. Faycurry promptly left and went to Auburn Hills police to file a complaint. Plaintiffs claim that they remained locked out of the office for several days.

Plaintiffs filed this action on March 11, 2014 claiming constructive eviction, assault and battery, negligent destruction of property, and intentional infliction of emotional distress. Plaintiffs also sought immediate injunctive relief to allow them to access the office and retrieve their property. Plaintiffs' case was initially assigned to Judge Colleen O'Brien who denied Plaintiffs' request for emergency ex parte injunctive relief. Two days after Plaintiffs filed their complaint, LaLonde Properties filed a complaint against Faycurry alleging that he breached the lease by failing to pay rent and CAM charges and leaving the property in damaged condition. Both cases were reassigned to the Business Court docket and consolidated before this Court.

The parties apparently agreed to resolve Plaintiffs' request for injunctive relief and Plaintiffs were allowed to access the office on March 19, 2014. Plaintiffs claim that they when they entered the office they discovered extensive damage to their equipment and property, including damage that rendered the dental equipment inoperable. Plaintiffs further claim that they were forced to purchase over \$224,000 in new equipment to replace the damaged equipment that they intended to install in their new office.

The matter is now before the Court on Defendants' motion for summary disposition under MCR 2.116(C)(10), which tests the factual support for Plaintiffs and Defendants' claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Defendants first assert that Plaintiffs' constructive eviction claim fails because LaLonde Properties did not act unlawfully in changing the office locks. However, this argument is premised on Defendants' claim that it reasonably believed that Plaintiffs abandoned the property. The statute prohibiting an owner from unlawfully interfering with a tenant's possessory interest states that interference is not unlawful if "the owner believes in good faith that the tenant has abandoned the premises, and after diligent inquiry has reason to believe the tenant does not intend to return, and current rent is not paid." MCL 600.2918(3)(c). Plaintiffs present evidence that they had not finished moving out of the office space at the time the locks were changed and their equipment was still there. Thus, there is a question of fact whether Defendants had a good faith belief the Plaintiffs abandoned the premises and did not intend to return. Defendants are not entitled to summary disposition of the constructive eviction claim on this ground.

Defendants also claim that Plaintiffs cannot present evidence of damages they suffered due to their inability to access the premises. Although Faycurry presents evidence that he was unable to work during that time, Defendants claim that Faycurry's inability to work was the result of problems at the new office, citing evidence that Plaintiffs did not obtain their certificate of occupancy at the new facility until sometime in April 2014. Although Plaintiffs do not have substantial evidence that Defendants' alleged unlawful interference caused injury, there is some evidence showing a question of fact to be resolved at trial. To the extent that Plaintiffs fail to produce sufficient admissible evidence at trial to take their damages claim outside the scope of speculation, Defendants may renew their argument through a motion for directed verdict.

Regarding the assault and battery claim, Defendants argue that Faycurry's assertion that LaLonde unilaterally assaulted him is not credible because Faycurry's account of what happened has changed over time. However, this Court cannot determine credibility on a dispositive motion. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Because there is evidence that LaLonde assaulted Faycurry, Defendants are not entitled to summary disposition of this claim.

Defendants further assert that Plaintiffs' negligent destruction of property claim fails because they cannot show that Defendants damaged the property. Although Plaintiffs have no direct evidence that Defendants caused the damage, Plaintiffs have sufficient circumstantial evidence to raise a question of fact for trial including testimony that the dental equipment was in working order before Defendants changed the locks and Plaintiffs did not have access to the property until ten days later when they discovered damaged property. Defendants also claim that Plaintiffs cannot show that they suffered damage, noting that Plaintiffs purchased new dental equipment before the planned move. However, Plaintiffs have evidence that they purchased additional equipment after they discovered the damaged equipment, which is sufficient to raise a question of fact on their damages for the alleged property destruction. To the extent that Plaintiffs are unable to produce admissible evidence at trial that their new equipment purchase was necessitated by Defendants' alleged damage to the old equipment, Defendants can raise this argument in a directed verdict motion.

Defendants next argue that Plaintiffs' intentional infliction of emotional distress claim fails because Defendants cannot show outrageous conduct. To prevail on an intentional infliction of emotional distress claim, Plaintiffs must show that LaLonde's conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be

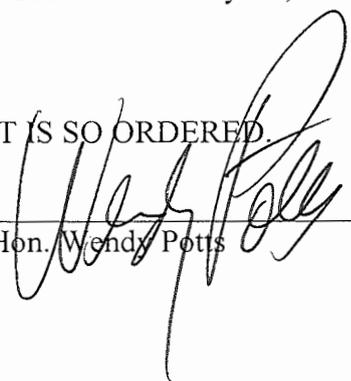
regarded as atrocious, and utterly intolerable in a civilized community.” *Roberts v Auto-Owners Ins Co*, 422 Mich 594, 603; 374 NW2d 905 (1985). Plaintiffs present evidence that LaLonde violently assaulted Dr. Faycurry without provocation in the presence of his young son. Whether this conduct meets the outrageousness test sufficient to support Plaintiffs’ claim is a question for the trier of fact. Defendants are not entitled to summary disposition on this claim.

In their final argument, Defendants assert that Plaintiffs cannot show a question of fact on LaLonde’s claims that Plaintiffs were in arrears on their rent and CAM charges. Although Dr. Faycurry admitted that Plaintiffs were behind on their CAM payments, he testified that he was current in rent payment in March 2014. Defendants note that Plaintiffs have no documentary evidence of Faycurry’s claim that the rent was current. Because Faycurry admits that he was not current in his rent obligations, there is no question of fact that he breached the lease, and Defendants are entitled to summary disposition of their liability for their breach of lease claim. However, Faycurry’s testimony is sufficient to raise a question of fact on the amount owed, which must be left to the trier of fact.

For all of these reasons, the Court grants Defendants summary disposition of Plaintiffs’ liability for breaching the lease. In all other respects, summary disposition is denied.

The Court adjourns the trial date from February 19, 2015 to February 26, 2015 at 8:30 a.m.

Dated: **FEB 13 2015**

IT IS SO ORDERED.


Hon. Wendy Potts